

MAY 14 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)

Implementation of the Subscriber Carrier)
Selection Change Provisions of the)
Telecommunications Act of 1996)

Policies and Rules Concerning)
Unauthorized Changes of Consumers)
Long Distance Carriers)

CC Docket No. 94-129

OPPOSITION TO MOTION FOR WAIVER

The National Telephone Cooperative ("NTCA"), by its attorneys and pursuant to Section 1.45(a) of the Federal Communications Commission's ("FCC" or "Commission") rules, 47 C.F.R. 1.45(a), hereby submits its opposition to MCI WorldCom, Inc.'s ("MCI") Motion for Stay of the Commission's liability rules for unauthorized carrier changes, or "slamming."¹ NTCA opposes stay of the liability rules without concomitant suspension of the verification rules.²

¹ The rules were established in the Second Report and Order and Further Notice of Proposed Rulemaking, In re Implementation of the Subscriber Carrier selection Changes Provisions of the Telecommunications Act of 1996, FCC 98-334, rel. Dec. 23, 1998 ("Slamming Order").

² In connection with that decision, the Commission found that executing carrier verification was a violation of Section 222(b) of the Communications Act as amended on the basis that the information exchanged in the course of such verification was proprietary with respect to the carrier. Therefore, in order for suspension of the verification rules to be effective, the FCC must also suspend its finding with respect to Section 222(b).

I. MCI HAS NOT MET THE CRITERIA FOR A STAY

The four-pronged test for grant of a stay is: likelihood of prevailing on the merits; the moving party will be harmed absent a stay; grant of a stay will not cause harm to others; and the public interest will not be harmed.³ MCI has not met this test.

A. Consumers and LECs Would Be Harmed by Grant of a Stay Unless the Verification Rules are Also Stayed or Suspended

MCI's argument that no party would be harmed by grant of its motion for a stay of the FCC's slamming liability rules is incorrect; LECs would be harmed if the slamming liability rules established by the Slamming Order are stayed, while the verification rules set forth in that same Slamming Order are enforced.⁴ The two key components of the FCC's Slamming Order are the verification rules and the liability rules. Together, these new rules were intended to curb the enormous amount of slamming that has been taking place in recent years.

If the liability provisions are stayed, but the verification provisions are not, executing carriers (typically LECs) who are prohibited under the new rules from verifying carrier change requests, will have lost the ability to deter slamming. At the same time, more stringent penalties imposed upon slammers would be held in abeyance. The result will be an increase in slamming. In the Slamming Order, the Commission stated "LECs...should experience less concern over slamming in the future because our new rules, especially the absolution remedy, should decrease consumer harm from slamming." The Commission should not, therefore, stay one rule without

³ See, *Washington Area Metro. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977).

⁴ The verification rules became effective April 27, 1999, 64 Fed. Reg. 9219 (Feb. 24, 1999)

suspending the other⁵.

The harm to executing carrier/LECs will take the form of increased time and resources to address rising slamming complaints and loss of customer good will as a result of LECs' inability to prevent slamming of their customers. LEC customers, particularly LEC customers in rural areas served by NTCA members, who have long-standing and often personal relationships with their LECs, look to them to guard against slamming. And local telephone customers typically hold their LEC responsible for whatever billing error or fraud (such as slamming) occurs, whether or not the LEC has the ability (in this case the authority) to do anything about it.

B. A Stay is Not in the Public Interest

As NTCA pointed out in its Petition for Reconsideration of the Slamming Order⁶, by prohibiting executing carriers from verifying carrier change requests, the Commission removes an acknowledged, effective weapon against slamming. Further, even though executing carrier/LECs are removed from the deterrent side of the slamming equation, their customers will continue to expect LECs to be pro-active and protect them from being slammed. The public and LECs will be harmed by a stay of the liability rules unless the verification rules are also suspended.

C. Harm to Moving Party

In evaluating MCI's claims of harm to itself if the rules become effective, the Commission must balance any such harm with the harm to consumers and LECs if the rules are stayed. MCI's

⁵ In addition to suspension of Section 64.1100, the Commission must also rescind its conclusion in paragraph 99 of the Slamming Order in regard to Section 222(b) in order to maintain the *status quo ante*.

⁶ Petition for Reconsideration filed March 18, 1999.

request for a more streamlined process for administering the tens of thousands of slamming complaints is tainted by MCI's responsibility for a good portion of those complaints. Since MCI can remedy much of the injury itself by eliminating slamming by its employees and agents, it is not in a position to request a stay. The enormous number of slamming complaints cited by MCI can also be reduced by such proven prophylactic measures as executing carrier verification.

MCI also argues for a stay in order to preserve the status quo. Yet, grant of MCI's Motion to stay the Commission's slamming liability rules will not preserve the status quo, so long as the new verification rules, which hamstring efforts to thwart slamming, are operative.

D. The Absolution Rule is Not Necessarily Inconsistent with Section 258

MCI contends that the FCC rule that absolves subscribers from payment to the unauthorized carrier for 30-days violates Section 258(b) because the authorized carrier does not recover the charges that are forgiven.⁷ It is not clear that this argument will prevail on the merits. The rule permitting subscribers that have been slammed to be absolved from payment for thirty days is consistent with the objective of depriving the slamming carrier of the incentive to slam by depriving it of the revenues, even if it also has the effect of depriving the authorized carrier of the revenues it would have had the opportunity to earn.⁸ Since the liquidated damages prescribed by Section 258(b) are the charges collected by the slamming carrier, if it collects no charges because

⁷ MCI Motion at 7.

⁸ NTCA pointed out in its Petition for Reconsideration that the 30 day time period running from the time of the slam will often not be adequate for consumers to determine that they have been slammed. This concern may be somewhat ameliorated by the Commission's May 12, 1999 decision to require bills to highlight change in carriers.

of the absolution rule, it has no liability to the authorized carrier.⁹ Despite the dissents from the Slamming Order, in this circumstance the challenge does not appear to meet the “likely to prevail” standard.

II. A PARTY SEEKING EQUITABLE RELIEF MUST HAVE "CLEAN HANDS"

As a party seeking equitable relief, MCI must have "clean hands." MCI's request for a stay of the slamming liability rules is prompted by the fact that it will be faced with tens of thousands of slamming complaints to process. Yet, as the record in this proceeding shows, MCI bears a major portion of the responsibility for the huge number of slamming complaints. MCI cannot, in an action in equity, complain that process for administering the large number of slamming complaints is too burdensome, when it could cure a significant portion of the problem itself.

III. CONCLUSION

Delaying the liability rules while allowing the verification rules to take effect would undermine the FCC's anti-slamming efforts, and unfairly expose executing carrier/LECs to increased liability as slamming continues unchecked. Therefore, MCI's Motion for Stay should be denied unless the Commission simultaneously suspends its verification rules and rescinds its Section 222(b) finding.

⁹ Absent the liability for damages created by Section 258(b), the authorized carrier would appear to have no claim on revenues for service it did not provide.

Of Counsel:

David Cosson
Kraskin, Lesse & Cosson, LLP
2120 L St. N.W.
Washington, D.C. 20037
202 296 8890

May 14, 1999

Respectfully submitted

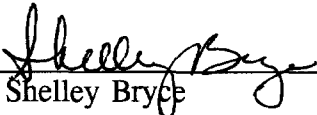
National Telephone Cooperative Association

By L. Marie Guillory *mon*

L. Marie Guillory
Jill Canfield
Its Attorneys
4121 Wilson Blvd.
Arlington, VA 22203
703 351 2020

CERTIFICATE OF SERVICE

I, Shelley Bryce, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Opposition to Motion for Waiver", was served this 14th day of May, 1999, by first class, U.S. Mail, postage prepaid to the following parties:


Shelley Bryce

William E. Kennard, Chairman *
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, DC 20554

Susan Ness, Commissioner *
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, DC 20554

Gloria Tristani, Commissioner *
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, DC 20554

Harold Furchtgott-Roth, Commissioner *
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, DC 20554

Michael K. Powell, Commissioner *
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, DC 20554

Dorothy Attwood *
Chief, Enforcement Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Anita Cheng *
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Glenn Reynolds *
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Alexander P. Starr *
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Judy Boley *
Performance Evaluation and Records
Management
Federal Communications Commission
445 12th Street, SW, Room A1836
Washington, DC 20554

Kathy Brown *
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, DC 20554

International Transcription Service *
1231 20th Street, NW
Washington, DC 20036

* Via Hand Delivery

Kevin C. Gallagher
360 Communications Company
8725 W. Higgins Road
Chicago, IL 60631

Rogena Harris
Harisha Bastiampillai
Helein & Associates, P.C.
8180 Greensboro Drive, Suite 700
McLean, VA 22102
Counsel for ACTA

David A. Gross
AirTouch Communications
1818 N Street, Suite 800
Washington, DC 20036

Gary L. Phillips
1401 H Street, NW, #1020
Washington, DC 20005
Counsel for Ameritech

Mark C. Rosenblum
Peter H. Jacoby
AT&T Corp.
295 North Maple Avenue
Room 3250J1
Basking Ridge, NJ 07920

Stephen E. Bozzo
Michael E. Glover
James G. Pachulski
Bell Atlantic Telephone Companies
1320 North Court House Road
8th Floor
Arlington, VA 22201

John T. Scott, III
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Counsel for Bell Atlantic Mobile, Inc.

Rachel J. Rothstein
Paul W. Kenefick
Brent M. Olson
Cable and Wireless USA, Inc.
8219 Leesburg Pike
Vienna, VA 22182

M. Robert Sutherland
Richard M. Sbaratta
Rebecca M. Lough
1155 Peachtree Street, NW, Suite 1700
Atlanta, GA 30309-3610
Counsel for BellSouth Corporation and
BellSouth Telecommunications, Inc.

Danny E. Adams
Rebekah J. Kinnett
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
Counsel for Billing Information Concepts
Corp.

Robert Taylor
Brittain Communications International Corp.
600 Jefferson, Suite 500
Houston, TX 77002

Peter Arth, Jr.
Lionel B. Wilson
Mary Mack Adu
Helen M. Mickiewicz
505 Van Ness Ave.
San Francisco, CA 94102
Counsel for the People of the State of
California and for the PUC of the State of
California

Jack B. Harrison
Frost & Jacobs, LLP
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Counsel for Cincinnati Bell Telephone

Christopher J. Wilson
Thomas E. Taylor
Cincinnati Bell Telephone Company
201 East Fourth Street, 6th Floor
Cincinnati, OH 45202

John B. Adams
Citizens Utilities Company
1400 16th Street, NW, Suite 500
Washington, DC 20036

Carol Anne Bischoff
Robert M. McDowell
The Competitive Telecommunications
Association
1900 M Street, NW, Suite 800
Washington, DC 20036

Robert J. Aamoth
John J. Heitmann
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
Counsel for CTA

Ian D. Volner
Heather L. McDowell
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Avenue, NW, Suite 1000
Washington, DC 20005
Counsel for The Direct Marketing Assoc.

J. Christopher Dance
Robbin Johnson
Excel Communications, Inc.
8750 North Central Expressway
Dallas, TX 75231

Dana Frix
C. Joel Van Over
Swidler & Berlin, Chartered
3000 K Street, NW, Suite 300
Washington, DC 20007
Counsel for Excel Communications, Inc.

Cynthia B. Miller
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Michael J. Shortley, III
Frontier Corporation
180 S. Clinton Avenue
Rochester, NY 14646

Gail L. Polivy
GTE Service Corporation
1850 M Street, NW, Suite 1200
Washington, DC 20036

Richard McKenna
GTE Telephone Operations
600 Hidden Ridge
Irving, TX 75038

Jeffrey S. Linder
Suzanne Yelen
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006
Counsel for GTE Service Corp.

Jonathan E. Canis
Andrea D. Pruitt
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
Counsel for Intermedia Communications,
Inc.

Gary L. Mann
IXC Long Distance, Inc.
1122 S. Capitol of Texas Hwy #100
Austin, TX 78746-6426

Douglas W. Kinkoph
LCI International Telecom Corp.
8180 Greensboro Drive, #800
McLean, VA 22102

Bryan G. Moorhouse
Susan Stevens Miller
Maryland Public Service Commission
6 Saint Paul Street
Baltimore, MD 21202

Karen Finstad Hammel
Montana Public Service Commission
1701 Prospect Avenue
P.O. Box 202601
Helena, MT 59620-2601

Linda F. Golodner
Susan Grant
National Consumers League
1701 K Street, NW, Suite 1200
Washington, DC 20006

Timothy S. Carey
Ann Kutter
Kevin M. Bronner
Douglas W. Elfner
Stephen A. Berger
New York State Consumer Protection Board
Five Empire State Plaza
Albany, NY 12223-1556

Lawrence G. Malone
New York State Dept. of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Robert P. Gruber
Antoinette R. Wike
Vickie L. Moir
Public Staff-N.C. Utilities Commission
P.O. Box 29520
Raleigh, NC 27626-0520

Robert S. Tongren
Evelyn R. Robinson
Ohio Consumers' Counsel
77 South High Street, 15th Floor
Columbus, OH 43221-4568

Phillip F. McClelland
Irwin A. Popowsky
Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

Joseph Kahl
RCN Telecom Services, Inc.
105 Carnegie Center
Princeton, NJ 08540

Jean L. Kiddoo
Dana Frix
Marcy Greene
Swidler & Berlin, Chartered
3000 K Street, Suite 300
Washington, DC 20007
Counsel for RCN Telecom Services, Inc.

Wendy S. Bluemling
The Southern New England Telephone Co.
227 Church Street
New Haven, CT 06510

Robert M. Lynch
Durward D. Dupre
Mary W. Marks
Marjorie M. Weisman
Attorneys for Southwestern Bell Telephone
Company, Pacific Bell and Nevada Bell
One Bell Center, Room 3520
St. Louis, MO 63101

Nancy C. Woolf
Jeffrey B. Thomas
Attorneys for Southwestern Bell Telephone
Company, Pacific Bell and Nevada Bell
140 New Montgomery Street, Room 1529
San Francisco, CA 94105

Leon M. Kestenbaum
Jay C. Keithley
Michael B. Fingerhut
Sprint Corporation
1850 M Street, N.W., Suite 1100
Washington, DC 20036

Suzi Ray McClellan
Kristen Doyle
Texas Office of Public Utility Counsel
P.O. Box 12397
Austin, TX 78711-2397

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W., Suite 701
Washington, DC 20006
Counsel for Telecomm. Resellers Assoc.

Pat Wood, III
Judy Walsh
Public Utility Commission of Texas
1701 N. Congress Avenue, 7th Floor
Austin, TX 78711

David R. Poe
Yvonne M. Coviello
LeBoeuf, Lamb, Greene & MacRae, LLP
1875 Connecticut Avenue, NW, Suite 1200
Washington, DC 20009
Counsel for Time Warner Communications Holdings, Inc

Paul B. Jones
Janis Stahlhut
Donald F. Shephard
Time Warner Communications Holdings Inc
290 Harbor Drive
Stamford, Connecticut 06902

Michael R. Gardner
William J. Gildea, III
Harvey Kellman
Law Offices of Michael R. Gardner, P.C.
1150 Connecticut Avenue, NW, Suite 710
Washington, DC 20036
Counsel for TPV Services, Inc.

Kathryn Marie Krause
Dan L. Poole
US West, Inc.
1020 19th Street, NW, Suite 700
Washington, DC 20036

Peter M. Bluhm
State of Vermont Public Service Board
112 State Street, Drawer 20
Montpelier, VT 05620-2701

Edward C. Addison
Virginia State Corp. Communications Staff
P.O. Box 1197
Richmond, VA 23218

Timothy R. Graham
Joseph M. Sandri, Jr.
Robert G. Berger
Russell C. Merbeth
Winstar Communications, Inc.
1146 19th Street, NW, Suite 200
Washington, DC 20036

John P. Finedore
Assistant Director
U.S. General Accounting Office
441 G Street, NW, Mail Stop 2723
Washington, DC 20548

Mary L. Brown
MCI WorldCom, Inc.
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Genevieve Morelli
Senior Vice President of Government
Affairs and Senior Associate General
Counsel
4250 North Fairfax Drive
Arlington, VA 22203

James M. Smith
Vice President
Excel Telecommunications, Inc.
1133 Connecticut Avenue, NW, Suite 750
Washington, DC 20036

Lawrence E. Sarjeant
Mary McDermott
Linda Kent
Keith Townsend
Hance Haney
John Hunter
United States Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005

William F. Maher, Jr.
Halprin, Temple, Goodman & Maher
555 12th Street, NW, Suite 950 North
Washington, DC 20004
Counsel for U.S. Telephone Association

Susan J. Bahr
Law Offices of Susan J. Bahr
P.O. Box 86089
Montgomery Village, MD 20886-6089
Counsel for Western Iowa Telephone
Association

Charles D. Gray
James Bradford Ramsay
National Association of Regulatory Utility
Commissioners
1100 Pennsylvania Avenue, Suite 608
P.O. Box 684
Washington, DC 20044

Robert M. Lynch
Roger K. Toppins
Barbara R. Hunt
SBC Communications Inc.
One Bell Plaza, Room 3026
Dallas, Texas 75202

Tanisha Lyon Brown
Assistant Attorney General
Public Utilities Section
180 E. Broad Street, 7th Floor
Columbus, OH 43215

Karen Kerrigan
President
Small Business Survival Committee
1320 18th Street, NW, Suite 200
Washington, DC 20036

Ronald Binz, President
Debra Berlyn, Executive Director
Competition Policy Institute
1156 15th Street, NW, Suite 520
Washington, DC 20005

Susan M. Eid
Richard A. Karre
1919 Pennsylvania Avenue, NW, Suite 610
Washington, DC 20006